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IN THE

Supreme Court of the United States

October Term, 1951

No. 514.

LEROY J. LEISHMAN,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Supreme Court of the United States:

Your petitioner hereby petitions this Honorable Supreme Court for a rehearing of his petition for a writ of certiorari. The present petition is filed under the provisions of Rule 33(2) of the Revised Rules of the Supreme Court of the United States, which reads in part:

> "* * * Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect * * * *or to other substantial grounds available to petitioner although not previously presented* * * *." (Emphasis added.)

Subsequent to the filing of the original petition, it has become increasingly clear that the many injustices and inconsistencies that have characterized the litigation of the

patent here at issue during the thirteen years in which it has been before the courts, have arisen primarily through a dangerous type of violation of Rule 52(a) F. R. C. P., upon which this Honorable Court has never passed.

It has also become apparent to petitioner since the filing of the original petition that this Honorable Court's decisions in *Cuno Engineering Corporation v. Automatic Devices Corporation,* 314 U. S. 86, 62 S. Ct. 37, and *Jungerson v. Ostly and Barton Company,* 355 U. S. 560, may be said to have modified the rule for determining invention enunciated in *Expanded Metal Co. v. Bradford,* 214 U. S. 366, and stressed by petitioner in his petition and reply brief, and that it should be called to the attention of this Honorable Court that petitioner's combination also fully meets the Bradford test *as thus modified.* The pertinence of the *Cuno Engineering* decision was not discussed in any manner in the petition and reply brief.

This petition for rehearing is accordingly based upon the following additional reasons not previously presented.

Additional Reasons Relied Upon for the Granting of the Writ.

1. The Court of Appeals for the Ninth Circuit has violated the spirit of Rule 52(a) and defeated its purpose in so far as the present case is concerned by making its own findings on technical matters and then basing its decision upon the assumption that these findings were accurate, whereas the rule provides that such finding shall be made by the trial court to permit witnesses for both parties to be examined and cross-examined and their credibility appraised by the trial judge while they testify. This type of violation results in cases being decided upon

grounds on which the litigants have not had their day in court.

2. If the appellate court, as its decision indicates, was interested in technical information that was not in the record, and if it found relevance in theories upon which the lower court had no opportunity to pass, the appellate court should have remanded the case to the lower court for the new trial which petitioner moved the lower court to grant under the provisions of Rule 59, F. R. C. P. [R. 59.] The denial of this motion by the trial court was one of the errors presented upon appeal. [R. 689, 691, 692.]

3. The appellate court has not decided this case in accordance with this Honorable Supreme Court's applicable decision in *Cuno Engineering Corporation v. Automatic Devices Corporation,* 314 U. S. 86, 62 S. Ct. 37.

The first of these three additional reasons why the writ should be granted, raises the following additional question of general importance:

Additional Question to Be Decided.

A. Inasmuch as Rule 52(a), F. R. C. P. states that the trial court "shall find the facts specially," and that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," is it proper for a Court of Appeals, as in the instant case, to supply the type of information ordinarily elicited from expert witnesses and then make its own findings in accordance therewith?

This very important question regarding the application of Rule 52(a) has been answered in the negative by the Courts of Appeals for the Sixth and Seventh Circuits,

as will hereinafter be shown, but the purpose and spirit of the rule have both been disregarded by the Courts of Appeals for the Ninth and Tenth Circuits. The question is one of such far-reaching importance, particularly to the correct determination of patent cases, that it should be answered by this Honorable Supreme Court.

Summary Statement of the Relevant Facts and the Pertinent Law Regarding the Appellate Court's Violations of Rule 52(a).

In *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.,* this Honorable Court said (336 U. S. 271, 274, 69 S. Ct. 535, 537):

> "Rule 52(a) of the Federal Rules of Civil Procedure provides in part: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' In no type of case is this last clause more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which a trial court may be enlighted by scientific demonstrations."

If it would have been wrong in the *Graver* case for this Honorable Court merely to set aside findings of fact based upon "the testimony of experts as to which a trial court may be enlighted by scientific demonstrations," then it is wrong for an appellate court itself to take the place of the experts and supply technical information under circumstances where there is no possibility of cross-examination or refutation or enlightenment by scientific demonstrations. This type of violation of the rule is even worse

than the kind which this Honorable Court has disapproved, yet the Court of Appeals for the Ninth Circuit decided the present case on just that basis.

Referring to a lack of technical evidence on a point of theory, the court said [R. 1196]:

> "While appellant contented himself with explaining the success of the [prior art] Schaefer tuner as resulting from these extra parts [which petitioner eliminated after others had failed], *the record is completely lacking in any explanation as to why the extra parts accomplished that result.*"[1] (Petitioner's emphasis and bracketed explanations.)

The appellate court itself then proceeded to supply the "lacking" technical information by explaining what it thought "the trial court could fairly conclude" [R. 1196] as to the manner in which balance was obtained and creeping eliminated in the Schaefer tuner; and the appellate court's ultimate finding on this point was that "basically the desired result is obtained because the tappet is so shaped and located that an imbalance is not possible." [R. 1197.]

The very theory here advanced and accepted by the appellate court was advanced by the witness opposing the patent in the case of *Leishman v. The Richards and Conover Company*,[2] but no finding supporting this theory was made by the trial judge because the witness on cross-

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[1]If the theory behind the Zenith-Schaefer tuner was in any way an anticipation of petitioner's simplification, it was clearly respondent's burden to present the theory to the trial court and explain why it was not helpful to the General Motors, Zenith and Crosley engineers who undertook to simplify the complicated device.

[2]Civil Action No. 2155 in the United States District Court for the Western District of Oklahoma.

examination admitted it was wrong.[3] But in the present case, the erroneous theory is advanced *not* by a witness who can be examined in the trial court, but by the appellate court itself where the double checks contemplated by Rule 52(a) are not available.

In view of the Richards and Conover attempt to make it appear that the absence of creeping in the Schaefer tuner was due to the position of the tappet, petitioner anticipated a similar attempt at the trial of the present case, and he accordingly prepared a special model of the Schaefer tuner so that the court could be "enlightened by scientific demonstrations." In this model, the position of the tappet could be altered at will, and it operated just the same regardless of where it was placed. But respondent offered no testi-

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[3]The witness opposing the patent in that action was Dr. Spotts, Associate Professor of Machine Design at Northwestern University, and his admissions were made in response to the court's own questions, as follows:

"Q. (By the Court): Can you take that round spot, No. 55 [the pivot on which the tappet is mounted], in that yellow design, and put it any place other than where it is and the thing still work properly? A. *You can move it sidewise.*

"Q. Draw pictures of it there where it could be. Can you do that? Just take your pencil and draw a lot more of them, a lot of *other positions* where it could be. A. It could be located, if you have lateral support for members 26 and 27; *then you move this center sidewise without any effect in the operation.*

'Q. It could be anywhere on that line? A. *It could be sidewise* providing parts did not interfere. Providing that did nothing more than make points 57 and 58 retain contact with the horizontal surface.

"Q. It could be anywhere on that line you have drawn across there? A. I don't mean over here. (Indicating.)

"Q. I understand, but a reasonable distance so it would not conflict with any of the other parts. *Now if it is moved a quarter of an inch to the left of your line you say it would still work?* A. *Providing there is lateral guidance.*" [Page 192 of The Richards and Conover record filed in the present record by respondent.] (Petitioner's emphasis.)

mony of any kind in opposition to petitioner's testimony that creeping was prevented in the Schaefer tuner by the addition of the various extra parts, and petitioner was not even cross-examined on this point. The burden of proof to establish a different state of facts was upon respondent. Inasmuch as no attempt was made to do so, there was no occasion to introduce and demonstrate the model for the trial court. One does not rebut testimony that has not been offered.

Continuing to discuss the Schaefer tuner, the appellate court advanced still other technical information of a nature that should have come only from an expert in the trial court, where the witness could have been cross-examined and opposing testimony offered according to the provisions of Rule 52(a). The court said [R. 1197]:

> "* * * What appellant has done in effect (although there is no evidence of any conscious effort to that end), has been to tie together with cross-members the ends of the two lower arms or cross-bars of Schaefer, and to cut off the racks and pinions above the arms, and to insert rotatable shafts at the center of the new tie bars so that the arms or cross-bars on which the tappet operates will now rotate instead of move up and down. Here, as in the Schaefer device, creeping is avoided because of the attained equilibrium, the pressure on either side being continuously the same, and *this is obtained, of course, through the coaxiality resulting from the modifications just described.*" (Parenthetical explanation by the court; emphasis by petitioner.)

This additional error in the appellate court's unwarranted fact-finding, is demonstrated by the simple drawing appearing on the folding insert at the back of this petition. Superimposed upon the same drawing from the Schaefer patent which the court reproduced on page 1193 of its opinion, petitioner in green ink has drawn the tie bars connecting the cross-bars in the manner hypotheticated by the appellate court, and he has shown a rotatable shaft "at the center of the new tie bars" precisely as indicated by the court. But it will be noted that there is no "coaxiality resulting from the modifications just described." The shaft, shown at the center of the rocker, is *not* coaxial with the pivot of the tappet.

Petitioner's structure was thus not arrived at in any such manner as the appellate court has hypothecated, yet the court's erroneous assumptions have been made the basis of its reasoning that petitioner's combination involved only mechanical skill.[4]

Under the second reason relied upon for the allowance of the original petition, page 12 thereof, it was mentioned

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[4]Apparently Marschalk arrived at his structure in some such manner as the court has described. Marschalk's Fig. 14 has been reproduced directly under Schaefer's Fig. 4 on the folding insert. The altered Schaefer arrangement and Marschalk's figure bear a striking resemblance. Neither one is coaxial. The court itself tells us that Marschalk's tuner "proved unsatisfactory because of difficulty of avoiding 'creeping' . . ." [R. 1188], and the same would of course be true of a tuner arrived at by modifying the Schaefer tuner in the manner described by the court. None of the workers in the art had any idea that creeping could be prevented by shaping the tappet and rocker so that their axes would become coincident, or coaxial.

that the appellate court had said it could not reverse the lower court because the latter had had the exclusive opportunity of listening to the testimony of a certain witness whose testimony the appellate court stated was reasonably credible, whereas actually the testimony referred to by the appellate court had failed to stand up under cross-examination and the witness was accordingly not even mentioned in the lower court's opinion. It did not occur to petitioner when the original petition was filed, but this unauthorized appraisal of the credibility of the testimony of this witness by the appellate court was actually a serious violation of Rule 52(a). The task of determining the credibility of the witness and of making appropriate findings is delegated by Rule 52(a) to the trial court, which made no finding whatever regarding the said testimony—because it was controverted by the witness himself on cross-examination; but the appellate court, through this violation of Rule 52(a), came to a highly erroneous conclusion detrimental to petitioner because the appellate court did not have the opportunity afforded the trial court of hearing this witness testify.

What better demonstration could one want of the danger that lurks in fact-finding by appellate courts than the serious errors hereinbefore pointed out. In the instant case, gross injustice has resulted. The trial court made no findings whatever about these matters, but the appellate court's clearly erroneous findings have become the basis of the latter's opinion, which was in accordance with

its false premises. The Court of Appeals for the Sixth Circuit condemns this practice as follows:

> "* * * Without findings of fact from the trial court, the reviewing court would, in our judgment, violate both the letter and the spirit of Rule 52 in passing upon a controverted issue of fact * * * not determined in the trial court."
>
> *Hazeltine Corporation v. Crosley Corporation,* 130 F. 2d 344, 349.

The Court of Appeals for the Seventh Circuit, while not stating specifically that such a procedure is a violation of Rule 52(a), has nevertheless expressed its disapproval of formulating an opinion upon grounds which were not argued before the trial court. A suit had been filed in the District Court for the Northern District of Illinois involving a patent which the Court of Appeals for the Sixth Circuit had previously held invalid on a ground that had not been interposed in, nor considered by, the court below, nor had the ground been briefed or argued by either party. But notwithstanding the fact that the patent owner had thus never had its day in court on the ground upon which it had lost the Sixth Circuit case, Judge Sullivan in the Northern District of Illinois in the *Seventh* Circuit nevertheless granted a summary judgment against the patent owner in the new case because of the Sixth Circuit holding. When Judge Sullivan's decision was appealed, the Court of Appeals for the Seventh Circuit said:

> "As to Hazeltine v. General Motors, 170 F. 2d 6, it should be observed that the defense of 'statutory bar' was not interposed in the District Court. It

> was not briefed or argued by either party and not even considered in the lower court. *Consequently that decision is entitled to but little weight in the present proceedings.*" (Emphasis added.)
>
> *Hazeltine Research, Inc. v. General Electric Company,* 183 F. 2d 3, 6.

The said decision was "entitled to but little weight" because it was improperly arrived at. The impropriety there, as here, resulted from a violation of the letter and spirit of Rule 52(a).

Although this Honorable Court in the *Graver* case, ***supra,*** stressed the rule that findings made by the lower court should not be set aside unless clearly erroneous, it has never passed upon the propriety of an appellate court's making its own findings upon matters where the trial court has made no findings at all or "where the record is completely lacking"—to use the words adopted by the Court of Appeals of the Ninth Circuit to describe the void which it proceeded to fill with its own unchecked technical theories. In the present instance, this type of violation of Rule 52(a) has resulted in your petitioner losing the case on grounds upon which he has never been heard, because a litigant has no opportunity to introduce expert testimony or to give scientific demonstrations in opposition to theories advanced for the first time in the final decision of an appellate court. This type of violation is very serious, particularly in patent cases, and this Honorable Court should take the present opportunity to pass upon its propriety.

The Lower Courts Erred in Not Acting Upon Petitioner's Motion for a New Trial Under Rule 59, F. R. C. P.

In passing upon this question, this Honorable Supreme Court could well tell the appellate court that since the latter has attached controlling significance to matters that should be determined by the trial court, the case should be remanded to the lower court for such a new trial as petitioner moved the lower court to grant under the provisions of Rule 59, F. R. C. P. The lower court, as stated by the appellate court [R. 1192], "relied heavily" upon the decision of the Court of Appeals for the Tenth Circuit in *The Richards and Conover Company v. Leishman,* 172 F. 2d 365, an opinion based solely upon technical theories and a purported mathematical analysis formulated for the first time in that appellate court's opinion and admittedly having no basis in the record of that case. (See petitions filed in Supreme Court case No. 612, October Term, 1948.) The appellate court's opinion in that case was rendered *after* the present case had been tried, but *before* the lower court herein had rendered its opinion. Petitioner consequently had no opportunity to introduce expert testimony in the present record to show that the Court of Appeals for the Tenth Circuit was in error. When the lower court in the present case freely admitted [R. 42] that it was greatly influenced by the Tenth Circuit decision, your petitioner protested that he was thus losing *both* cases upon grounds advanced for the first time by the Court of Appeals for the Tenth Circuit and on which he had not been heard, and he consequently filed a motion with the said lower court to amend the findings or to grant a new trial [R. 59 *et seq.*] to permit the introduction of

testimony and other evidence in refutation of these new grounds.

In support of his motion for a new trial and in order to show the type of evidence that could be introduced, your petitioner filed affidavits by three outstanding authorities to the effect that the Tenth Circuit "analysis" was wrong. [R. 71 to 97.] These authorities were the heads of the departments of mechanical engineering at California Institute of Technology and the University of California, and the head of the corresponding department at the University of California at Los Angeles. Petitioner's motions were nevertheless "denied *in toto*." [R. 99.]

The refusal of the lower court to grant a new trial for the purposes here mentioned, was the basis of points 14, 15 and 16 in your petitioner's Concise Statement of Points upon which Defendant-Appellant will Rely as Required by Rule 75(d), F. R. C. P. * * *." [R. 689, 691, 692, to which this Honorable Court is respectfully referred.] These same points, bearing the same numbers, were repeated in the "Specification of Errors Relied Upon," which appeared in Defendant's-Appellant's Opening Brief herein.

The appellate court did not act upon the error of the trial court in refusing to grant this motion. The appellate court merely referred to the drawings made by the other appellate court, saying [R. 1200]: "We think it is not of particular importance here whether the court's diagram was, or was not, properly drawn." Instead of permitting your petitioner to show that the "analysis" made by the Court of Appeals for the Tenth Circuit was in error, the present appellate court advanced new and

substitute theories of its own which your petitioner likewise has had no opportunity to refute.

The failure of the Court of Appeals for the Ninth Circuit to act upon the trial court's error in denying the motion for a new trial, coupled with the appellate court's actions in making its own findings of fact and building its opinion around them, has thus resulted in a situation where we have opinions from *two* different courts of appeals each based upon technical theories that petitioner has had no opportunity to refute by expert testimony because the theories were advanced by the appellate courts themselves in violation of the provisions of Rule 52(a).

Why do these appellate courts set aside the findings of the lower courts and make totally new findings on points that should be supported by expert testimony before the trial judge? Perhaps the answer lies in the ironical fact that the better an inventor does his job, the less valuable his work appears. Most anyone seeing Schaefer's complete tuner would think that great genius was required for its conception. But if an inventor works hard and gets his device down to the acme of simplicity, it appears offhand that anyone could have done as well. As this Honorable Court said in *Diamond Rubber Company of New York v. Consolidated Rubber Tire Company,* 220 U. S. 428, 434: ". . . problems once solved present no difficulties. . . ." But the experts who have opposed the present patent know there were once difficulties in these tuners that seemed inherent in such structures unless various extra parts were introduced and that it took a flash of inspiration to find a simple solution. This is especially true of respondent's expert Schwarz, who himself worked on the problem. Schwarz knew that if he advanced theoretical alibis for his own dilemma that he would be tripped up on cross-

examination, as was Dr. Spotts at the Richards and Conover trial. There is consequently an absence of evidence against the patent; and the appellate courts, somehow, have felt obliged to advance their own theories as to how petitioner's combination could readily have been produced. The courts should have remembered that the General Motors, Crosley and Zenith engineers all tried in vain to produce a simple adjustable tappet tuner that would not creep, and that only petitioner succeeded.

This Case Has Not Been Decided in Accordance With the Supreme Court's Cuno Engineering Decision.

The foregoing brings us to a consideration of the fact that the criterion of invention given in *Expanded Metal Co. v. Bradford,* 214 U. S. 366, which this situation fully meets, has been in effect modified by this Honorable Court's later opinion in *Cuno Engineering Corporation v. Automatic Devices Corporation,* 314 U. S. 84, 62 S. Ct. 37, and that it has not been brought to this Honorable Court's attention that the present case has not been decided in accordance with the *Cuno* decision.

Since the *Cuno* opinion was rendered, a combination to be patentable must not only meet the test described as "safe" in the *Expanded Metal* case (see footnote 4, page 9, of the original petition herein), but the element that gives novelty to the combination must function in a new way or produce a result different from that produced by the said element in previous devices.

In the *Cuno* decision, this Court said (p. 89):

> "* * * the question is whether it was invention for one skilled in the art and familiar with Morris and Copeland, and with the extensive use of the automatic theremostatic control of an electric heating

circuit, to apply the Copeland automatic circuit to the Morris removable heating unit in substitution for a circuit manually controlled."

* * * * * * * *

"* * * As we have shown, both the thermostatically controlled heating unit and the lighter with a removable plug bearing the heating unit were disclosed by the prior art." [P. 89.]

* * * * * * * *

"* * * A new application of an old device may not be patented if the 'result claimed as new is the same in character as the original result' (Blake v. San Francisco, 113 U. S. 679, 683) even though the new result had not been contemplated. Pennsylvania R. R. Co. v. Locomotive Engine Safety Truck Co., 110 U. S. 490, 494, and cases cited. Certainly the use of a thermostat to break a circuit in a 'wireless' cigar lighter is analogous to or the same in character as the use of such a device in electric heaters, toasters, or irons, whatever may be the difference in detail of design." [Pp. 91-92.]

In the instant case, the unwanted rotation exhibited in Marschalk's tuner during the setting process was entirely eliminated by altering the shape of the tappet and rocker and changing the relationship of their axes. These parts then behaved in an entirely different way and accomplished a result which had only been achieved in the past by using many more parts. If the altered tappet and rocker were not new and different parts by virtue of this change, then it certainly can be said that the addition of the coaxial relationship between the axes of these members constituted

the addition of a new element. The question to be determined then becomes: Had a coaxial relationship ever been used before to stop unwanted rotation caused by the pressure of one freely pivoted member upon another? Respondent's own expert Schwarz, who was a man highly skilled in the art, admitted that he knew of no analogous use. He testified [R. 429-430]:

"Q. (By petitioner's attorney John Flam): Will you answer whether you have ever made parts coaxial in order to prevent movement of one of the parts? A. (By respondent's engineer Schwarz): *I cannot think at this moment of an instance.*

Q. Can you think of any example of one in which movement of both parts is prevented after they have become coaxial?

* * * * * * * *

The Witness: May I hear the question again?

(The question referred to was read by the reporter as follows: 'Can you think of any example of one in which movement of both parts is prevented after they have become coaxial?')

The Court: Movement of both parts?

Mr. Flam: Yes.

A. *I am sorry, I can't at this moment.*

Q. (By Mr. Flam): Then, so far as you know, this arrangement shown in the Leishman patent and as exemplified in these exhibits is unique, you haven't been able to find anything prior to 1937 like it, is that right? A. I haven't testified to the fact that I have seen this device presented to me as coaxiality. I don't believe that I could say that as of 1937 or 1938 or 1939 was the beginning of seeing this device as a unique one.

> Q. Prior to 1937 you saw no device, then, in which the principle or relationship of the parts utilized coaxiality to prevent any movement of one or both of the parts that become coaxial. A *I cannot think of an instance at this moment."* [R. 429-430; emphasis added.]

The unprecedented nature of petitioner's use of a coaxial relationship was also confirmed by Dr. Spotts, Associate Professor of Machine Design at Northwestern University, who was the expert witness opposing the patent in *The Richards and Conover* case, *supra.*[5] His testimony on other points was quoted by the Court of Appeals for the Ninth Circuit in its opinion here sought to be reviewed.

None of the workers in the art thought of using a coaxial relationship for the *prevention* of rotation, because it had been used for hundreds of years for the opposite purpose of *facilitating* rotation.

> "The importance of the mechanical relationship [coaxiality] is well known in the art and a feature that must be considered in all machine designing

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[5]Dr. Spotts, on cross-examination, testified as follows:

"Q. (By Mr. Flam): Do you know of any device where a freely pivoted member presses on another freely pivoted member, both members being on separate pivots, in which movement between them is prevented by making them coaxial in a fully engaged position?"

Dr. Spotts at first did not grasp all of this question. Mr. Flam's clarification and Dr. Spott's answer were as follows:

"Q. Here we have two relatively movable bodies on separate axes and when they are brought together in full engagement there is some relative movement which is prevented by bringing the axis of one into the axis of the other. Do you know of *any* such device? *If you do I would like to hear about it?* A. *I don't believe I know of any."* [Pp. 195-196 of the *Richards and Conover* record, filed by respondent herein, emphasis added.]

> *when you desire parts to move together harmoniously* and free from friction . . . It is a mechanical principle that is hundreds of years old." (Petitioner's emphasis.)
>
> *Leishman v. Associated Wholesale Electric Company,* 36 Fed. Supp. 804, 808.

The Court of Appeals for the Tenth Circuit confirmed this statement as to the nature of the prior uses of coaxiality:

> "The principle of coaxial relationship and its importance *where it is desired that two parts of a machine operate together harmoniously,* has been within the knowledge, for many years, of ordinary mechanics skilled in the art." (Petitioner's emphasis.)
>
> *The Richards and Conover Company v. Leishman,* 172 F. 2d 365 at 369.

As Mr. Schwarz and Dr. Spotts testified, petitioner's use of a coaxial relationship for the opposite purpose of *preventing* rotation, was thus unprecedented. Unlike the situation that made the new combination unpatentable in the *Cuno* case, the use of the added element in petitioner's combination was not "analogous to or the same in character" as the prior uses. What better authority can we have for this than the statements of these two experts who were opposing the patent.

This test of invention, as well as the others applied by this Honorable Court in its decisions discussed in the original petition and supporting brief, were not followed by the Court of Appeals for the Ninth Circuit, and the appellate court has thus not decided this case in accordance with this Honorable Supreme Court's applicable and controlling decisions.

Conclusion.

Since the volunteer findings made by the Court of Appeals for the Ninth Circuit to support the lower court's opinion, are obviously in error, this Honorable Court should grant the petition so that the courts below may be reversed and a ruling made by this Honorable Court regarding the type of violation of Rule 52(a) that has produced the serious injustices demonstrated in this petition.

There is ample *undisputed* evidence in the testimony of respondent's own witnesses to support a proper opinion based upon the pertinent and controlling decisions of this Honorable Court, which said decisions are not concerned with such irrelevant matters as the mechanical theories behind admittedly unsatisfactory devices that skilled engineers tried unsuccessfully to simplify or to make operable before they were displaced by the patented combination in question.

Should this Court feel, however, that a determination of the issues requires correct findings upon the particular things on which the appellate court based its opinion, then there should be a new trial in accordance with petitioner's motion under Rule 59, F. R. C. P., which the lower court denied and the appellate court seemed to think unnecessary in view of its own findings on the points that would have been clarified by such new trial. The new trial was requested in order that petitioner might have an opportunity to introduce testimony and scientific demonstrations to show that the opinion of the Court of Appeals of the Tenth Circuit, which admittedly influenced the lower court herein, was wrong in its volunteered theoretical analysis of the difficulty that had to be overcome.

Inasmuch as this analysis dealt with the same difficulty which the Court of Appeals for the Ninth Circuit tried in the instant case to explain by its own volunteered findings, the originally requested new trial will automatically permit proper findings to be made upon the particular points on which the Court of Appeals for the Ninth Circuit based its erroneous opinion herein. If the case is remanded to the lower court for such new trial, it should therefore be limited to a consideration of these theoretical questions. It is urged, however, that such questions are irrelevant in view of the presence of abundant undisputed evidence of the kind required for a proper determination in accordance with the principles enunciated in this Honorable Court's pertinent and controlling opinions. Such a determination would be the safer course in the interest of justice in the present case, as most any trial judge at this stage in the litigation would be unconsciously inclined to decide the case in a manner that would not conflict with the previous expressions of its appellate court.

Respectfully submitted,

JOHN FLAM,
Counsel for Petitioner.

Certificate.

It is hereby certified that this petition is filed in good faith and not for delay and that it is confined to grounds not presented in the original petition.

JOHN FLAM,
Counsel for Petitioner.

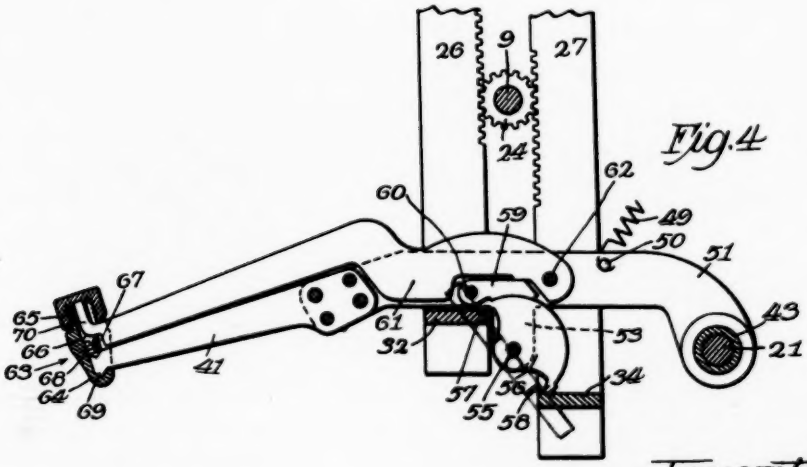

Fig. 4

Inventor:
Joseph M. Schaefer
By J. Clarke Hagey Atty.

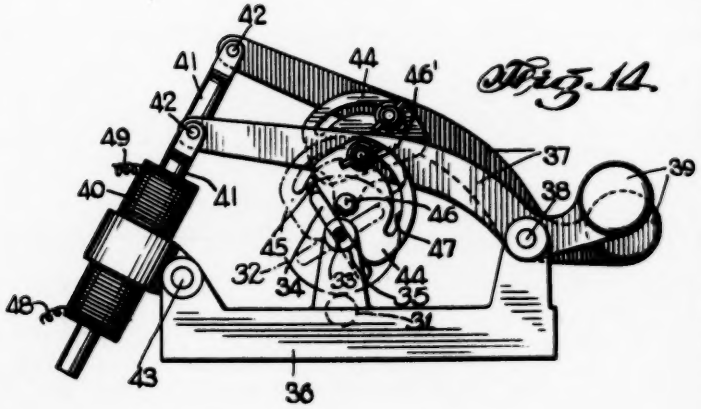

Fig. 14.

IN THE

Supreme Court of the United States

October Term, 1951
No. 514

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CHARLES ELMORE CROPL
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LEROY J. LEISHMAN,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

RENEWED PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI.

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Los Angeles 46, California,
Petitioner, In Propria Persona.

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LEROY J. LEISHMAN,

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RENEWED PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI.

The Appellate Court Has Based Its Decision Upon Grounds and Purported Facts Adopted Without Due Process of Law.

Your petitioner is filing this renewed petition for a rehearing of the order denying certiorari, because he believes it has not been made clear to this Honorable Court that the decision sought to be reviewed, like all the previous appellate court decisions regarding this patent, was based upon purported facts and grounds advanced *subsequent* to the trial, *and that his constitutional rights have been violated by depriving him of his day in court* to present evidence and expert testimony to show that these purported facts are untrue and that there is no

substance to the grounds belatedly advanced against him. These purported facts were presented for the first time in the decision of the appellate court itself.

The appellate court explained that the trial court had "relied heavily" [R. 1192] upon the decision of the Court of Appeals for the Tenth Circuit in *The Richards and Conover Company v. Leishman*, 172 F. 2d 365. As a matter of fact, less than two pages of the trial court's ten-page opinion [bottom of R. 46 to middle of R. 48] was devoted to the evidence before it. The Court of Appeals accordingly undertook to bolster the lower court's opinion by presenting information of a technical nature on points where the appellate court said the record was lacking, and by usurping the duties delegated by Rule 52(a) to the trial judge.

The injustice of this situation is augmented by the fact that the decision of the Court of Appeals for the Tenth Circuit, which influenced the lower court herein, was itself based upon purported facts and theories appearing for the *first* time in *that* appellate court's opinion, which was rendered *after* the trial of the instant case. Petitioner consequently had no opportunity to introduce evidence or testimony either in the present case or in the Tenth Circuit case to show that the theories and purported facts presented by the Court of Appeals for the Tenth Circuit, and influencing the lower court herein, were in error. It was for the purpose of introducing such evidence into the present record that petitioner filed his Motion for a New Trial under Rule 59 [R. 59 *et seq.*], which was denied [R. 99]. Petitioner has thus never had his day in court to introduce evidence and testimony in refutation of the grounds which *either* of these appellate courts raised against him.

This situation could not have arisen had these appellate courts observed the provisions of Rule 52(a), F. R. C. P. This rule has the effect of implementing the 5th Amendment to the Constitution, which reads in part:

> "* * * No person shall . . . be deprived of life, liberty or property, *without due process of law,* nor shall private property be taken for public use without just compensation." (Emphasis added.)

Rule 52(a) contemplates that findings of fact will be based upon evidence presented before the district court where the grounds advanced against either party may be opposed by the testimony of witnesses whose credibility is to be determined by the trial judge.

According to Daniel Webster, the "due process of law" guaranteed by the Constitution is "The law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." American citizens, brought up on this tradition, have a feeling of security because of these constitutional guarantees, and they believe that the courts will immediately come to a citizen's rescue if these guarantees are violated. When circuit courts of appeals advance the purported facts and grounds upon which their decisions are based and thus violate the constitutional guarantees of litigants by depriving them of their day in court, there is no place to appeal for redress of these wrongs excepting to this Honorable Supreme Court which is the special guardian of the Constitution. Of what good are the high-sounding phrases of the 5th Amendment if they are disregarded in actual practice by the courts themselves?

It is not necessary to go further than the opinions to verify that he courts of appeals, in the litigation with respect to this patent, have advanced the grounds and supplied the purported facts upon which their opinions were primarily based.

Instance No. 1.

In this regard, the petition for rehearing (p. 5) quoted the admission of the Court of Appeals for the Ninth Circuit as to a lack of evidence on a technical point, as follows:

> "'While appellant contented himself with explaining the success of the [prior art] Schaefer tuner as resulting from these extra parts [which petitioner eliminated after others had failed], *the record is completely lacking in any explanation as to why the extra parts accomplished that result.*' (Petitioner's emphasis and bracketed explanations.)"

In view of this admission regarding a lack of evidence as to how the desired result was attained in the Schaefer tuner, it is unnecessary to prove that the court was itself supplying the supposed factual data when it stated that "basically the desired result [in the Schaefer tuner] is obtained because the tappet is so shaped and located that an imbalance is not possible." [R. 1197.] The petition for rehearing (pp. 5 to 7 thereof) showed that this supposed statement of fact is in error; but, true or false, such purported fact should not have been used by the appellate court as a premise in its reasoning—*because your petitioner had no opportunity to present expert testimony or other evidence in refutation.*

Instance No. 2.

It is also unnecessary to prove that the court's explanation as to the manner in which petitioner arrived at his structure, is likewise a theory originating with the court itself and having no basis in the record, for the court specifically states [R. 1197] "there is no evidence of any conscious effort to that end . . ." The petition for rehearing showed that the court's volunteered theory on this point was in error;[1] but erroneous or true, the appellate court should not have hinged its decision on the assumption that its theory was correct—because the Constitution guarantees every man the right to present a defense against the grounds upon which he is deprived of his property.

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[1]The court of appeals contended that petitioner had in effect tied Schaefer's lower cross bars together with cross members or tie bars and inserted rotatable shafts "at the center of the new tie bars so that the arms or cross-bars on which the tappet operates will now rotate instead of move up and down," and that equilibrium was obtained "through the coaxiality resulting from the modifications just described." On the folding insert at the back of the Petition for Rehearing, such an arrangement was drawn on a reproduction of Schaefer's Fig. 4. Reference to this figure shows that when the tips 57 and 58 of Schaefer's tappet are in contact with cross bars thus tied together, the axis of Schaefer's tappet *lies in the same plane as the top surface* of the tie bars, and such axis could therefore not be coaxial with shafts inserted *"at the center* of the new tie bars," as described by the court. An axis lying on the top surface of the tie bars would clearly not be coaxial with an axis *at the center* of the tie bars. No testimony to the effect that such an arrangement would be coaxial was introduced at the trial, nor was such a theory presented by respondent: the supposed statements of fact about this were based upon the appellate court's own incorrect observations which petitioner had no opportunity to expose as erroneous. Prior to petitioner's invention, no one suspected that "creeping" could be prevented by changing the relative position of the axes. The skilled workers in the art all tried to solve the problem by introducing extra parts, as shown by the patents of the Crosley, Zenith and General Motors corporations and by the actual tuners used by Zenith and General Motors before they adopted petitioner's teachings.

Instance No. 3.

A third ground advanced by the appellate court for holding against the patent, involves what might be called a compound violation of petitioner's constitutional rights, for this third ground is supported solely by a previous decision of the Court of Appeals for the Ninth Circuit which was itself based upon grounds advanced only by the appellate court and upon which petitioner was given no opportunity to be heard.

In this connection, the court says [R. 1209-1210]:

> "The most outstanding respect in which appellant's claimed invention falls short of meeting these tests[2] [of invention given in the appellate court's opinion in Pointer v. Six Wheel Corporation, 177 F. 2d 153] is in respect to the fourth item, for the evidence fails to show that it superseded any prior devices or met with any commercial success. No *lever* operated tuner with appellant's tappet rocker system, either with or without the additional provision for television tuning, was ever built commercially. The only tuners manufactured under license from appellant were *leverless push-button tuners of the type held not to be covered by the patent in suit in Leishman v. Commercial Electric Co., supra.*" (Petitioner's emphasis and bracketed explanation.)

None of the claims at issue requires that petitioner's combination be operated by a lever; in fact, the invention has nothing whatever to do with the operating means.

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[2]The inference here is that the court considers that petitioner's combination fails to meet the tests in some other way, but the opinion mentions none. Footnote 16 on page 44 of the Brief in Support of Petition for Writ of Certiorari showed that petitioner's combination fully meets the said tests in all respects.

Yet in support of its contention that "the evidence fails to show that it superseded any prior devices or met with any commercial success," the appellate court says that "No *lever* operated tuner with appellant's tappet rocker system . . . was ever built commercially." The court thus refuses to consider the millions of tuners "with appellant's tappet rocker system" that were *plunger* operated. The court justifies its failure to consider these by referring to them as "*leverless* push-button tuners of the type held not to be covered by the patent in suit in *Leishman v. Commercial Electric Co., supra.*" Since there was no litigant by the latter name, the court obviously means *Leishman v. Associated Wholesale Electric Co.*, 137 F. 2d 722. The grounds relied upon by the appellate court in that case for its holding that "leverless" tuners were not covered by the patent, were novel grounds originating with the appellate court itself, and your petitioner and the lower court consequently had no opportunity to consider them.[3] When the appellate

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[3]In the *Associated* case, the lower court held the claims invalid for want of invention and no findings were made with respect to infringement, but the appellate court wiped out the holding of invalidity and acted only upon infringement—basing its decision upon novel grounds of its own. The court held that the reissue claims at issue were not for the same invention as the original claims unless they included levers. Original claim 5 included no lever, but the court specifically mentioned that it was not considering this claim because it had later been disclaimed. It was not disclaimed, however, until several months after the reissue patent, which included claim 5, was granted with six narrower claims that likewise included no lever. Claim 5 was thus a part of the original patent when the reissue was granted with the additional narrower claims. To say that the *subsequent* disclaimer of claim 5 made it improper to consider this original claim when determining whether the reissue was for the same invention as the original, is like holding that children born in wedlock to parents who are *later* divorced, become illegitimate on the grounds that the subsequent divorce makes it improper to consider that the parents had ever been married.

court contends in the *instant* case that petitioner's combination does not meet the fourth item in its tests for invention because the tuners that superseded the prior devices were "leverless" tuners held not to be covered by the patent in the *Associated* case, the court thus bases its action upon its previous decision which was arrived at through a violation of petitioner's constitutional right to be heard on the grounds raised against him.

The appellate court's decision in the instant case is thus built almost entirely upon improper findings made by the said court in violation of Rule 52(a) and upon grounds advanced for the first time in final decisions of the appellate court in violation of petitioner's constitutional right to present evidence and testimony in his own behalf.

As mentioned earlier in this paper, there would have been no occasion for the appellate court to manufacture theories and advance new purported facts in support of a decision against the patent, had the trial court based its own decision upon the testimony and other evidence herein instead of upon the decision in *The Richards and Conover Company v. Leishman, supra,* on which the present appellate court states that the trial court in the instant case "relied heavily" [R. 1192].

Instance No. 4.

When it is realized that the said *Richards and Conover* decision, which influenced the lower court herein, was based *entirely* upon grounds advanced *for the first and only time* by the Court of Appeals for the Tenth Circuit after *all* trials in connection with this patent had been

held,[4] it becomes clear that all the appellate court decisions with respect to this patent, as well as the decision of the lower court in the instant case, have been based primarily upon grounds on which your petitioner has never had his day in court.[5] The trials have meant little,

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[4]In the Petition for Writ of Certiorari in the *Richards and Conover* case, No. 612, October Term, 1948, reason 3a relied upon for the allowance of the writ was as follows:

> "a. The appellate court ignored the admissions of the expert opposing the patent, brushed aside the arguments that respondent advanced against validity, and proceeded *sui sponte* and incorrectly to analyze the problem solved by petitioner's combination."

The Petition for Rehearing in the *Richards and Conover* case, pages 17 to 26, showed very graphically that the grounds advanced by the appellate court, and which petitioner consequently had no opportunity to oppose by expert testimony and other evidence, were grossly in error. In the belief that this Honorable Supreme Court may not have copies available of the Petition for Rehearing in the *Richards and Conover* case, ten copies are being furnished herewith, marked Exhibit A.

[5]After this Honorable Supreme Court reversed the Court of Appeals for the Ninth Circuit in its dismissal of the appeal in *Leishman v. Associated Wholesale Electric Co.* (137 F. 2d 722; also 318 U. S. 203), the said court of appeals brushed aside the findings of the lower court with respect to validity and decided the case upon novel grounds respecting the issue of infringement—an issue on which the lower court had made no findings at all.

In *The Richards and Conover Company v. Leishman, supra,* the lower court had held the claims clearly valid and clearly infringed, but the Court of Appeals for the Tenth Circuit ignored the lower court's findings and all the evidence in the case and decided the issue of intention upon its own purported mathematical analysis of the problems involved.

In *Leishman v. Radio Condenser Company and General Instrument Corporation,* 167 F. 2d 890, the action originated with a complaint filed by these manufacturers under the Declaratory

for the so-called facts on which the decisions have hinged have been produced by the appellate courts themselves after petitioner's opportunity to defend his rights had passed.

Trials have been conducted in only three of the four cases that have been decided respecting this patent. Everything that the district courts said regarding the issues tried in the first two of these three cases, was wiped out by the appellate courts. Less than two pages of the ten-page opinion of the judge who conducted the present and last trial was devoted to the evidence before him. His findings were so erroneous that practically the entire opinion of the appellate court herein has been devoted to an effort to rationalize what was said in those two pages, and this rationalization has been supported almost entirely by purported facts and theories presented by the appellate court itself in violation of petitioner's constitutional right to be heard on the grounds raised against him. This history shows on its face that something is wrong, and that the supervisory attention of this Honorable Supreme Court is required.

Judgment Act, and it was decided without trial by Summary Judgment based upon the decision of the Court of Appeals for the Ninth Circuit in the earlier *Associated* case, which had been decided upon grounds on which petitioner had never been heard.

In the instant case, the action originated with a complaint filed under the Declaratory Judgment Act by General Motors Corporation, and the appellate court's decision has been based primarily upon erroneous purported facts asserted for the first time by the appellate court and upon a reassertion of the grounds relied upon in violation of petitioner's constitutional rights in the *Associated* case.

Decisions Cannot Be Based Upon Purported Facts Produced in Violation of a Litigant's Constitutional Rights.

This Honorable Supreme Court has many times held that decisions cannot be based upon evidence produced in violation of the constitutional rights of litigants. In *Weeks v. United States,* 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, 655, 656, 658, this Honorable Court said:

> "In Bram v. United States, 168 U. S. 532, L. Ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547, this court, in speaking by the present Chief Justice of Boyd's case, dealing with the 4th and 5th Amendments, said (544):
>
> " 'It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change." (58 L. Ed. 652, 655.)

At page 656 of its decision in *Weeks v. United States,* 58 L. Ed. 652, this Honorable Court said:

> "* * * If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

And at page 658, the Court said:

> "* * * In holding them [the letters and documents] and permitting their use upon the trial, we thing prejudicial error was committed." (Petitioner's bracketed explanation.)

If it is improper to use *actual* physical evidence because it is obtained in violation of a litigant's constitutional rights, even though he may have an opportunity to rebut such evidence, it is far worse to permit the use of purported facts that are court-conceived and which the litigant is denied his constitutional right to controvert.

In *Wolf v. People of the State of Colorado,* 338 U. S. 25, 69 S. Ct. 1159 at 1361, this Honorable Court said:

> "Due process of law . . . conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society."

Your petitioner respectfully urges that these rights that are basic to our free society should be enforced by the courts in behalf of inventors as well as others. In *Terminiello v. City of Chicago,* 69 S. Ct. 894, 337 U. S. 1, and in *Dennis et al. v. United States,* 71 S. Ct. 857, 341 U. S. 494, this Honorable Court has been very careful to consider whether the constitutional rights of communists and fascists have been protected, and your petitioner prays that his rights be given equal consideration.

In accordance with the doctrine expressed in *Weeks v. United States, supra,* none of the purported facts that have been offered in violation of petitioner's constitu-

tional rights, can properly be considered in this case. This Honorable Court should therefore grant the petition for a writ of certiorari to the end that a new and proper decision may be rendered in accordance with the evidence presented before the trial court.

Respectfully submitted,

LEROY J. LEISHMAN,
Petitioner, In Propria Persona.

JOHN FLAM,
Counsel.

Certificate.

It is hereby certified that this petition is filed in good faith and not for delay and that it is confined to grounds not presented in the original petition nor in the first petition for rehearing.

LEROY J. LEISHMAN,
In Propria Persona.